In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-737

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

FRANZ GLEN and GEORGE EVANKOVICH,
Respondents.

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

JOSEPH P. MAZZOLA,
Respondents.

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

FRANZ GLEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENTS GLEN AND EVANKOVICH

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January 31, 1979

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents FRANZ GLEN and GEORGE EVANKOVICH respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on July 19, 1978.[1]

OPINIONS BELOW
JURISDICTION
QUESTIONS PRESENTED
CONSTITUTIONAL PROVISIONS
STATEMENT OF THE CASE

With respect to the foregoing sections of this brief, respondents Glen and Evankovich adopt and incorporate by reference the corresponding sections of co-respondent Mazzola's brief in opposition, filed herein on or about January 16, 1979.

REASONS FOR DENYING THE WRIT

The Decision Below Is In Harmony With The Applicable Decisions Of This Court, Including Its Decision In PITTSBURGH PRESS CO. v. HUMAN RELATIONS COMMISSION, *413 U.S. 376 (1973).*

To the extent that this Court's decision in *Pittsburg Press Co. v. Human Relations Commission,* 413 U.S. 376 (1973), limits speech from the protection of the First Amendment, its scope is narrowly circumscribed. Nonetheless, the decision is neither in conflict with the decision

[1]The reason for the late filing of this brief is set forth in Exhibit A appended hereto.

below nor with this Court's decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

At its broadest, the *Pittsburg Press Co.* decision holds that a purely commercial advertisement that solicits an illegal transaction is not protected by the First Amendment. Within this holding, the decision operates, in effect, as a shorthand application of the constitutional standard set forth in *Brandenburg v. Ohio, supra,* 395 U.S. at 447. That is, it acknowledges that commercial advertising which solicits an illegal transaction inherently violates the *Brandenburg* standard, i.e., the commercial advertising is directed to produce imminent lawless action and is likely to result in such action.

The two examples of illegal transactions considered in the *Pittsburg Press Co.* decision, the sale of narcotics and the solicitation of prostitution, fit squarely within the *Brandenburg* standard. In *Pittsburg Press,* the Court observed that a commercial advertisement soliciting either crime would not be constitutionally protected speech. *Pittsburg Press Co., supra,* 413 U.S. at 388. Likewise, under the *Brandenburg* standard, it may be deemed inherent that such commercial advertisements are both directed to produce imminent lawless action and likely to result in such imminent lawless action, i.e., narcotic sales or acts of prostitution. These two examples aptly reflect the limited scope of the *Pittsburg Press* holding and its compatability with other decisions of this Court.

The *Pittsburg Press* approach, however, does not affect the within case for two basic reasons: first, the within advertisement was not a commercial solicitation; and second, the advertisement did not solicit an illegal transaction.

The District Court opinion below specifically found that the advertisement was noncommercial:

> "Any distinctions for First Amendment purposes between advertisements and other speech are inapplicable here *because the advertisement at issue was of a noncommercial nature.*" *Glen v. Hongisto,* 438 F.Supp. 10, 17 n. 13 (emphasis added)[2]

The correctness of the finding cannot be doubted as it is apparent that the advertisement was purely informational, directed to the public and the Board of Supervisors setting forth a grievance and presenting a political and socio-economic opinion.

It is just as apparent that the advertisement did not solicit an illegal transaction. Nowhere in the advertisement did it request that the San Francisco employees go out on strike; nowhere did it request that employees violate the law. To the contrary, the advertisement served two separate and substantial First Amendment interests as observed by the District Court:

> "The necessity for stringent protection is enhanced in the present case because there are two separate and substantial First Amendment interests at stake: the interest of the petitioners in airing their views, and the public's interest in being informed. *See, e.g., New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). With reference to the latter, the Supreme Court has emphasized that '[t]he public interest in having free and unhindered debate on matters of public importance [is] . . . the core value of the Free Speech Clause of the First Amendment

[2]The opinion is reproduced as Exhibit C to the Petition for a Writ of Certiorari.

> . . .' *Pickering v. Board of Education,* 391 U.S. 563, 573, 88 S.Ct. 1731, 1937, 20 L.Ed.2d 811 (1968); cf. *City of Madison v. Wisconsin Employment Relations Commission,* 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed. 376 (1976). In *Pickering,* the Court observed that teachers (the public employees concerned there) were the most likely to have informed opinions about spending funds allotted to schools. 391 U.S. at 572, 88 S.Ct. 1731. Similarly, the opinions of petitioners here must be deemed particularly valuable to the public." *Glen v. Hongisto, supra,* 438 F.Supp. at 17.

The type of advertisement for which respondents were held in contempt by the California trial court was, in fact, expressly protected by this Court in its *Pittsburg Press Co.* decision:

> "We emphasize that nothing in our holding allows goverment at any level to forbid Pittsburg Press to publish and disseminate advertisements commenting on the Ordinance [forbidding discriminatory business practices], the enforcement powers of the Commission, or the propriety of sex preference in employment." *Pittsburg Press Co., supra,* 413 U.S. at 391.

Thus, while the *Pittsburg Press Co.* decision may not enjoy the unanimity of the Court, the decision below is not in conflict with it, nor does the within case offer a legitimate basis for re-examining the Court's prior decisions.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Dated: January 31, 1979.

Respectfully submitted,

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(Exhibit follows)

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January 17, 1979

Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Richard Hongisto, etc., et al.
v. Franz Glen, et al., No. 78-737

Dear Mr. Rodak:

This office has just been informed of your letter of December 18, 1978 addressed to Albert Brundage informing his office that the Court requested a response to the certiorari brief filed by the City and County of San Francisco in the above captioned case. You will note that we were not copied on your letter. This office represents Respondents Glen and Evankovich. It had been our intention to waive the filing of an opposition brief. However if the court desires a response from us please so inform me of same and of the date upon which our brief should be filed.

Yours very truly,

JOHN L. ANDERSON

JLA:mlc